

**United States Department of Labor
Employees' Compensation Appeals Board**

F.H., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 19-1801
Issued: September 9, 2020**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:

ALEC J. KOROMILAS, Chief Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

On August 27, 2019 appellant, through counsel, filed a timely appeal from an August 2, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² The Clerk of the Appellate Boards assigned Docket No. 19-1801.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The record also contains an August 15, 2019 decision denying appellant's claim for wage-loss compensation from December 12, 2015 to September 14, 2017. He has not appealed this decision and thus it is not before the Board at this time. 20 C.F.R. § 501.3. The Board notes that on August 20, 2019 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review regarding the August 15, 2019 decision. (RD 8-20-19)

³ The Board notes that, following the issuance of the August 2, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

This case has previously been before the Board.⁴ The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 7, 2016 appellant, then a 64-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that on December 10, 2015 he bruised his right thigh when he tripped and fell, landing on a two-way radio that was in his right pocket.

By decision dated March 29, 2018, OWCP accepted appellant's claim for a contusion of the right thigh. By separate decision of even date, it denied modification of its August 21, 2017 decision, finding that the medical evidence of record was insufficient to establish that he had sustained right hip osteoarthritis, cervical myelopathy with radiculopathy, or lumbar radiculopathy causally related to his accepted December 10, 2015 employment injury.

On April 9, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated April 26, 2018, OWCP denied appellant's request for a telephonic hearing under 5 U.S.C. § 8124(b). It found that he had previously requested reconsideration under 5 U.S.C. § 8128(a) and thus was not entitled to a hearing as a matter of right.

Appellant, through counsel, appealed to the Board on June 4, 2018.

By decision dated November 7, 2018, OWCP denied appellant's claim for wage-loss compensation as the medical evidence of record was insufficient to establish that he was disabled from work during the claimed period of December 12, 2016 through September 14, 2017 due to his accepted employment injury. In a separate decision of even date, it expanded acceptance of his claim to include myositis ossificans traumatic of the right thigh and an aggravation of unilateral primary osteoarthritis of the right hip.

On November 15, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated January 18, 2019, the Board affirmed OWCP's March 29 and April 26, 2018 decisions.⁵ It found that appellant had not established that acceptance of his claim should be expanded to include right hip osteoarthritis, cervical myelopathy with radiculopathy, and lumbar radiculopathy causally related to the accepted December 10, 2015 employment injury. The Board further determined that OWCP properly denied his request for an oral hearing under 5 U.S.C. § 8124(b).

By decision dated April 29, 2019, OWCP's hearing representative vacated the November 7, 2018 decision denying appellant's wage-loss compensation claim. He found that the medical evidence from appellant's attending physician, Dr. Karl F. Bowman, Jr., a Board-certified orthopedic surgeon, was sufficient to warrant further development of the evidence. The hearing

⁴ Docket No. 18-1238 (issued January 18, 2019).

⁵ *Id.*

representative instructed OWCP to refer appellant for a second opinion examination to determine all conditions caused or aggravated by the accepted employment injury and whether he had any resulting employment-related disability.

On May 7, 2019 appellant, through counsel, requested reconsideration of OWCP's denial of expansion of his claim to include additional conditions. In support of his request, he submitted an April 12, 2019 report from Dr. David D. Alcantara, a Board-certified physiatrist.

On May 16, 2019 OWCP referred appellant to Dr. Kevin Hanley, a Board-certified orthopedic surgeon. In a report dated June 5, 2019, Dr. Hanley diagnosed employment-related myositis ossificans and a quadriceps contusion. He found that appellant had not aggravated his hip arthritis or any cervical or lumbar condition as a result of his December 10, 2015 employment injury. Dr. Hanley further opined that appellant was not disabled from December 12, 2016 to September 14, 2017 due to his employment injury.

By decision dated August 2, 2019, OWCP denied modification of its prior merit decision.⁶ In reaching its determination, it referenced only the April 12, 2019 report from Dr. Alcantara. OWCP did not review or discuss the report of Dr. Hanley, a second opinion physician, who specifically addressed the issue of whether appellant sustained additional conditions as a result of the accepted employment injury.

The Federal Employees' Compensation Act⁷ provides that, in deciding a claimant's entitlement to compensation benefits, OWCP is required by statute and regulations to make findings of fact after considering the claim presented by the employee and after completing such investigation as it considers necessary with respect to the claim.⁸ The Board has held that OWCP should base its decision on all the evidence currently of record.⁹ A decision that rests on only part of the evidence will be set aside.¹⁰ In the case of *William A. Couch*,¹¹ OWCP had not reviewed medical evidence received prior to the issuance of its final decision which denied the claim. The Board set aside the final decision and remanded the case for OWCP to consider this evidence fully.¹²

⁶ OWCP indicated that it was denying modification of the Board's January 18, 2019 decision; however, the decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d).

⁷ 5 U.S.C. § 8101 *et seq.*

⁸ 5 U.S.C. § 8124(a) provides that OWCP shall determine and make a finding of facts and make an award for or against payment of compensation. 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP shall contain findings of fact and a statement of reasons. *See also Reyna M. Gonzalez*, Docket No. 03-1023 (issued June 17, 2003).

⁹ *D.G.*, Docket No. 17-0514 (issued May 4, 2018); *Jovita Weaver*, 2 ECAB 122 (1948).

¹⁰ *L.T.*, Docket No. 19-0145 (issued June 3, 2018); *Marshall G. Wright*, 2 ECAB 182 (1949).

¹¹ 41 ECAB 548 (1990).

¹² *Id.*

The August 2, 2019 OWCP decision failed to reference or to provide findings related to Dr. Hanley's report. As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim which was properly submitted to OWCP prior to the time of issuance of its final decision be reviewed and addressed by OWCP.¹³ The Board cannot review such evidence for the first time on appeal.¹⁴ The case will be remanded to OWCP for proper consideration of the evidence of record. Following such further development as OWCP deems necessary, it shall issue a *de novo* decision on appellant's request for claim expansion.

IT IS HEREBY ORDERED THAT the August 2, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: September 9, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹³ See *S.K.*, Docket No. 18-0478 (issued January 2, 2019); *Yvette N. Davis*, 55 ECAB 475 (2004).

¹⁴ 20 C.F.R. § 501.2(c). See also *G.M.*, Docket No. 16-1766 (issued February 16, 2017).